No. 96-1693

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

STATE OF NEBRASKA,
PETITIONER,

-VS-

RANDOLPH K. REEVES,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE

The State of Arizona, through its Attorney General, respectfully offers this brief as Amicus Curiae in support of the Petitioner, the State of Nebraska. The law of Arizona, like that of Nebraska, provides for imposition of the death penalty even if culpability is found on the basis of the commission of felony murder, rather than premeditated murder. The law of Arizona holds that no lesser-included offenses exist to felony murder, so that no instructions on "lesser included offenses" may properly be given to a charge of felony murder, and the validity of proceeding in this matter, even in a case where the death penalty was imposed, was upheld in *Greenawalt v. Ricketts*, 943 F.2d 1020, 1029 (9th Cir. 1991), *cert. denied*, 506 U.S. 888 (1992).

However, the Eighth Circuit's decision in this case explicitly rejects *Greenawalt*, declaring that in *Greenawalt* the Ninth Circuit misunderstood *Beck v. Alabama*, 447 U.S. 625 (1980). Hence, so long as the glaring contradiction which exists between the understandings of *Beck* enunciated in *Greenawalt* and *Reeves v. Hopkins*, 102 F.3d 977, 982 (8th Cir. 1996) is allowed to continue

unresolved, a troublesome shadow is cast over the validity of numerous Arizona death penalty cases already completed, as well as upon all potential death penalty cases which might be tried on a felony murder theory in the future. The conflict between *Reeves* and *Greenawalt* will undoubtedly spawn further litigation until it is resolved, in every state with a similar felony murder doctrine, so that amicus (and other jurisdictions) possesses a profound and continuing interest in the resolution of the issue presented by Nebraska's petition.

SUMMARY OF ARGUMENTS

The Eighth Circuit ruled in this case that *Beck* had been violated because no lesser offense instructions were given to Reeves' jury, even though Nebraska law does not recognize the existence of any lesser-included offenses to the felony murders with which Reeves was charged. The Eighth Circuit so held, despite its acknowledgment of directly contradictory authority from another circuit, *Greenawalt*, on the basis that the court in *Greenawalt* misunderstood this Court's holding in *Beck*. Not only does this create an intercircuit split of authority, but it is plain that the Eighth

Circuit has itself misread *Beck*, ignoring the crucial fact that *Beck* was decided as it was because Beck's jury was involved in sentencing him as well as determining his guilt or innocence, while the Nebraska jury that convicted Reeves (like the Arizona jury that convicted Greenawalt) was completely unconcerned with the sentence, which was imposed exclusively by judges. Thus, the Eighth Circuit's opinion in this case is plainly wrong and introduces a serious element of uncertainty into every death penalty case tried under a felony murder theory in Nebraska, Arizona (the state of origin of *Greenawalt*), and any other state with a similar felony murder doctrine.

Moreover, the Eighth Circuit (aside from its error on the merits) erred in effectively establishing and retroactively applying a new rule of criminal procedure in a habeas corpus case, in direct contradiction of the rule of *Teague v. Lane*, 489 U.S. 288 (1989). The facts of this case (judge sentencing as opposed to jury sentencing) are so far afield from the holding of *Beck* that the Eighth Circuit's holding certainly constitutes a "new rule," but that new rule fits within neither of the two narrow exceptions permitted by

Teague. Hence, even if the Eighth Circuit's rule were substantively correct (which it is not), it was improper to announce and apply it in this habeas case. Therefore, this Court should grant Nebraska's petition for a writ of certiorari and reverse the Eighth Circuit's action in this case, on both of the grounds stated above.

ARGUMENTS IN SUPPORT OF GRANTING THE PETITION

I

THE EIGHT CIRCUIT'S DISAGREEMENT WITH THE RESOLUTION OF AN INDISTINGUISHABLE *BECK* ISSUE IN *GREENAWALT V. RICKETTS* IS PLAINLY WRONG, AND CREATES CONFUSION ABOUT THE PROPER UNDERSTANDING OF *BECK*, WHICH CAN ONLY BE REMEDIED BY THIS COURT'S GRANT OF CERTIORARI.

In *Beck*, this Court concluded that the giving of lesser-included offense instructions is, under some circumstances, constitutionally required in a capital case. Subsequently the Ninth Circuit applied *Beck* to a capital felony murder case from Arizona, holding that failure to give a lesser-included offense instruction was not error, because Arizona law does not recognize any lesser-included offenses to felony murder. *Greenawalt*:

> Greenawalt contends that the trial court erred by failing to instruct the jury on second degree murder or any

> lesser included offense. He correctly observes that due process requires such an instruction when the evidence warrants it. *Beck v. Alabama*, 447 U.S. 625, 636–37, 100 S. Ct. 2382, 2389, 65 L. Ed. 2d 392 (1980). He fails to point out the Supreme Court's subsequent clarification that "[w]here no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process. *Beck* does not require that result." *Spaziano v. Florida*, 468 U.S. 447, 455, 104 S. Ct. 3154, 3159, 82 L. Ed. 2d 340 (1984).
>
> Greenawalt was tried solely for felony murder, a crime for which Arizona law recognizes no lesser included offense. *Greenawalt I*, 128 Ariz. at 168, 624 P.2d at 846. . . . Here, the trial court committed no error.

When the same issue arose in this case, however, the Eighth Circuit explicitly rejected the *Greenawalt* decision. It accepted that, under Nebraska law (as under Arizona law), there are no lesser-included offenses in a felony murder case. *Reeves*, 102 F.3d at 982. It also noted that Nebraska had requested it to follow *Greenawalt*, but expressly refused to do so, stating that, "We cannot agree with [*Greenawalt's*] interpretation of the *Beck* doctrine," and accusing the Ninth Circuit of misunderstanding *Beck* and subsequent cases from this Court clarifying *Beck*. *Id.* at 982–83. Applying its own understanding of *Beck*, the Eighth Circuit concluded that giving of lesser offense instructions *was* constitutionally required in Reeves'

case by *Beck*, and granted habeas corpus relief. Thus, a starkly defined intercircuit split now exists, which potentially affects scores of capital cases.[1]

The plain fact is that *Reeves* was wrongly decided, because of its grievous misunderstanding of *Beck* and its progeny. This Court was careful in *Beck* to emphasize that the circumstances of that case were *sui generis*: "Alabama's failure to afford capital defendants the protection provided by lesser included offense instructions is *unique* in American criminal law." 447 U.S. at 635 (emphasis added). Alabama ordinarily permitted the giving of any lesser-included offense instructions which were supported by the evidence, and it was not disputed that, under general Alabama law, felony (non-capital) murder would have constituted a proper lesser-included offense of intentional (capital) murder. *Id.* at 630 n.5, 627–28.

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1. It is evident that the split will not be resolved by the Ninth Circuit receding from the understanding of *Beck* expressed in the *Greenawalt* decision quoted in the text. Shortly after the Eighth Circuit panel decided *Reeves*, Randy Greenawalt reached the end of his own litigation and argued to the Ninth Circuit that it should reconsider the *Beck* issue in light of *Reeves*. The Ninth Circuit stated that, "*Reeves* does not persuade us that we erroneously resolved Greenawalt's *Beck* claim." *Greenawalt v. Stewart*, 105 F.3d 1268, 1276 (9th Cir. 1997). Nor was this Court sufficiently persuaded that the Ninth Circuit was in error on this point to grant Greenawalt's petition for certiorari which questioned it. 117 S. Ct. 794 (1997).

Moreover, the prosecution acknowledged that evidence existed in Beck's case which would have supported the felony murder instruction. *Id.* at 629–30. However, Beck's jury was not given that option, because of a peculiar statute which specifically precluded the giving of lesser-included offense instructions in capital murder cases. *Id.* at 628 and n.3, 630.

This meant that the jury, which was led by its instructions to believe that it was the actual sentencer (although, in fact, the trial court had the final word on the sentence and could impose either life or death, regardless of what the jury concluded—*id.* at 639 and n.15, understood that it was presented with a stark either/or situation: convict of capital murder and impose the death penalty or acquit altogether. "[T]he jury was told that if petitioner was acquitted of the capital crime of intentional killing in the course of a robbery, he 'must be discharged' and 'he can never be tried for anything that he ever did to [the victim]'." *Id.* at 630.

The absence of any third option created two equally unacceptable but competing emotional pressures on Beck's jury: acquit even if they believed that the defendant was guilty of a serious

offense, but not such an offense that they felt the death penalty was appropriate; convict even if they were not convinced that the capital crime had been proved, so that a clearly guilty defendant would not escape all punishment. The result of these conflicting influences was that "in every case they introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Id.* at 642–43. "[T]he failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." *Id.* at 637. "Thus, the Alabama statute makes the guilt determination depend, at least in part, on the jury's feelings as to whether or not the defendant deserves the death penalty, without giving the jury any standards to guide the decision on this issue." *Id.* at 640.

This concern for the reliability of the *jury's* determination of *guilt*, undistorted by the very different considerations relating to whether or not death is an appropriate sentence, is the linchpin of *Beck*: "Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the

jury in a capital case." *Id.* at 638. And it is precisely this fundamental point which critically distinguishes *Beck* from *Reeves* (and from *Greenawalt* as well). Randolph Reeves was convicted by a jury whose sole concern was guilt or innocence (and which the trial record should reflect was instructed that it was not even to consider the possible penalties which might result from conviction). He then was sentenced in a completely separate proceeding by a panel of three judges, not by the jury. *Reeves*, 102 F.3d at 978–79.

Thus, *Beck's* determinative factor—sentencing by the same jury which decided on guilt—was not even present in Reeves' case.[2] However, the Eighth Circuit utterly failed to perceive the significance of the difference between jury sentencing which occurred in *Beck*, and judge sentencing which occurred in *Reeves*, as indicated by its sole mention of Nebraska's argument that Reeves'

2. Greenawalt, more like Reeves than like Beck, was sentenced by the trial judge. See former A.R.S. § 13-454(A), now renumbered as A.R.S. § 13-703(B), which establishes the role of the judge in Arizona's capital sentencing procedure. Arizona jurors neither have nor believe they have any role in the determination of sentence, even in capital cases. *See, e.g., State v. Martinez-Villareal*, 145 Ariz. 441, 449, 702 P.2d 670, 678, *cert. denied*, 474 U.S. 975 (1985) (veniremen may be voir dired concerning views on death penalty, even though jury's only function is determination of guilt, to insure ability to decide case in accordance with oath and instructions).

jury was not involved in his sentencing: "This case is like *Beck*: the jury had no ultimate control over the imposition of a death sentence and could only choose to convict Reeves of a death-eligible crime or to acquit him." 102 F.3d at 985 n.13. Completely absent is recognition of the fact that the *Beck* jury *believed* that it *did* have "ultimate control over the imposition of sentence": "The jury is not told that the judge is the final sentencing authority. Rather, the jury is instructed that it must impose the death sentence if it finds the defendant guilty and is led to believe, by implication, that its sentence will be final." 447 U.S. 639 n.15. It was that ultimately incorrect belief concerning the jury's power over sentence which gave rise to the competing but extraneous emotional factors described earlier (see 447 U.S. at 642–43), and which was the downfall of the Alabama scheme: "In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime." *Id.* at 642. However, no such confusion

could have occurred in Reeves' case, because he was sentenced, not by the guilt-phase jury, but in a completely separate proceeding before a panel of judges. Thus, the Eighth Circuit's *Beck* analysis misconceives the very crux of *Beck*.

Moreover, that is not the end of the Eighth Circuit's analytical errors. Any hint that a trial court must provide a third option to the jury where none would otherwise exist, just because the case is capital in nature, is conspicuously absent from *Beck*. "We do not read *Beck* or any other case as establishing a constitutional requirement that states create a noncapital murder offense for every set of facts under which a murder may be committed." *Hatch v. State of Oklahoma*, 58 F.3d 1447, 1454 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 1881 (1996). In pointing to cases from states other than Alabama which permitted the giving of lesser-included offense instructions in appropriate circumstances, this Court in *Beck* cited *State v. Valencia*, 121 Ariz. 191, 589 P.2d 434 (1979). 447 U.S. at 636 n.12. *Valencia* was a capital murder case, charged as felony murder, in which the trial court's refusal to give a second degree murder instruction was affirmed because the evidence showed

that the killing occurred in the course of one of the felonies enumerated in the murder statute. 121 Ariz. at 198, 589 P.2d at 441. *State v. Greenawalt*, 128 Ariz.150, 168, 624 P.2d 828, 846 (1981) quotes that portion of *Valencia*, holding that second degree murder instructions were not required in his case either. Thus, *Beck* itself strongly implies that the Ninth Circuit *Greenawalt* opinion was correct: this Court did not intend for *Beck* to reach situations like those in *Valencia* and this case, where under the ordinary terms of state law there simply do not exist any lesser-included offenses.

This understanding of what *Beck* really means is buttressed by this Court's subsequent cases applying it. In dealing with another case from Alabama, it emphasized that, "Our holding in *Beck*, like our other Eighth Amendment decisions in the past decade, was concerned with insuring that *sentencing discretion* in capital cases is channeled so that arbitrary and capricious results are avoided." *Hopper v. Evans*, 456 U.S. 605, 611 (1982) (emphasis added). But this means that "a lesser included offense instruction [need] be given *only* when the evidence warrants such an instruction." 456 U.S. at 611 (emphasis in original). If consideration of a lesser-included

offense is barred simply because the ordinary law of the state does not provide for one (as opposed to the situation in *Beck*, where the ordinary law did provide for the existence of lessers, but the preclusion statute *forbade application* of that ordinary law in the capital case), there is nothing which the trial evidence can support, and no constitutional requirement of an instruction on a non-existent lesser offense. This was made explicit in *Spaziano v. Florida*, 468 U.S. 447 (1984):

> Petitioner would have us divorce the *Beck* rule from the reasoning on which it was based. The element the Court in *Beck* found essential to a fair trial was not simply a lesser included offense instruction in the abstract, but the enhanced rationality and reliability the existence of the instruction introduced into the jury's deliberations. *Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process. Beck does not require that result.*

468 U.S. at 455 (emphasis added). Thus, where otherwise available lesser-included offenses did not exist, because the statute of limitations had run and the defendant refused to waive the limitations defense, *Beck* did not require the trial court to trick the jury by giving instructions on lesser includeds for which no conviction could actually occur. *Id.* at 456.

Reeves, despite its disclaimers, does precisely what this Court said must not be done—distort *Beck* into a mandate that the state courts either create non-existent lesser-included offenses or refuse to impose a death sentence. To apply such warped reasoning to a case from Nebraska is particularly perverse (another "divorc[ing of] the *Beck* rule from the reasoning on which it was based) because the whole rationale for *Beck* was the problem of a *jury* making irrational *sentencing* decisions as a result of the unique interplay of Alabama's statutes. "[T]he Court in *Beck* identified the chief vice of Alabama's failure to provide a lesser included offense option as deflecting the jury's attention from 'the *central issue* of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime'." *California v. Ramos*, 463 U.S. 992, 1007-08 (1983) (emphasis added by Court). As acknowledged even by the Eighth Circuit, capital sentencing in Nebraska is done by the panel of judges alone, so the rationale for *Beck* simply does not apply to Nebraska cases; the jury cannot have its attention "deflected from" the issue of guilt by concern about how that determination may impact on sentence, because the jurors

have no part in sentencing. *Reeves*, which did not involve jury sentencing, completely misplaced its reliance on *Beck*.

Finally, *Reeves* also is seriously defective in its insupportable conflation of *Beck* with *Enmund v. Florida*, 458 U.S. 782 (1982). *See* 102 F.3d at 984–85. *Beck* problems were specifically classified by this Court as "deficiencies in the jury's finding as to the guilt or innocence of a defendant," which cannot be cured by subsequent judicial action, in express contrast with *Enmund* findings, which can be made by judges, and at any level of the state process: "But our ruling in *Enmund* does not concern the guilt or innocence of the defendant—it establishes no new elements of the crime of murder that must be found by the jury." *Cabana v. Bullock*, 474 U.S. 376, 384–85 (1986). Thus, the analyses are quite separate, and the fact that in a given case the prosecution may not need to seek lesser-included offense instructions under *Beck*, because it proceeded under a felony murder theory which meant that no lessers existed, does not mean that it is "avoiding" *Enmund* (as *Reeves* pejoratively phrases it) when it produces evidence of the defendant's intent at sentencing

—that is allowing the safeguard which *Enmund* was intended to be to operate.

The Eighth Circuit has created a plain intercircuit split of interpretation of *Beck*, which necessarily spawns confusion over the correct understanding of a decision of this Court which is crucial to scores of death penalty cases. The Eighth Circuit's denial of rehearing en banc shows that the conflict can only be resolved by this Court. Nebraska's petition for certiorari should be granted, and the erroneous decision in this case should be reversed.

II

THE HOLDING HERE ESTABLISHES AND APPLIES A NEW RULE, CONTRARY TO *TEAGUE*, REQUIRING THAT CERTIORARI BE GRANTED TO CORRECT THAT ERROR.

In *Teague*, this Court determined that new rules of criminal procedure must not be retroactively applied in habeas corpus cases, absent either of two exceptions. *Teague* applies in capital cases. *Penry v. Lynaugh*, 492 U.S. 302, 313–14 (1989). In requiring that lesser offense instructions be given under the circumstances of this case, the Eighth Circuit established a new rule of criminal procedure and applied it retroactively to Reeves, in a habeas proceeding. This

is a clear violation of *Teague*, which this Court should grant certiorari to correct, quite aside from the substantive misapplication of *Beck* discussed above.

A. PRESENTATION OF *TEAGUE* ISSUE.

Although it is generally preferable to present all positions to be argued in this Court to the lower court, the *Teague* problem apparently was not noted in Nebraska's pleadings to the Eighth Circuit. This is hardly surprising, since the Eighth Circuit's deviant reading of *Beck* was unknown until the opinion issued (so that there was no reason be concerned with *Teague* before then), and the substantive error is so clear that *rehearing en banc* could reasonably have been expected to be granted without recourse to the more technical *Teague* question.

However, the failure to argue *Teague* to the Eighth Circuit does not preclude this Court from granting certiorari and considering it. *Teague* is raised by the Petition for Certiorari (Question Four). Although *Teague* is not jurisdictional, in the sense that this Court *must* raise the issue and decide it *sua sponte* when certiorari has been granted for some other purpose, *Collins v. Youngblood*, 497 U.S.

37, 41 (1990), whether the state raises "any *Teague* defense at the petition stage is significant." *Schiro v. Farley*, ___ U.S. ___, 114 S. Ct. 783, 789 (1994). Here, Nebraska has argued in its petition that *Teague* applies, and *Teague* "is a necessary predicate to the resolution of the [other] question presented in the petition." *Caspari v. Bohlen*, ___ U.S. ___, 114 S. Ct. 948, 953 (1994). "[I]f the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court *must* apply *Teague* before considering the merits of the claim." *Id.* (Court considered *Teague* issue despite Eight Circuit's insistence, as here, that it was merely applying existing precedent.). Therefore, having raised *Teague* in its petition to this Court, the first occasion on which it could reasonably be expected to be heard, Nebraska is entitled to a resolution of its *Teague* defense, as well as a decision on the merits of the circuit-splitting *Beck* issue.

B. *REEVES* CREATES A NEW RULE.

The first step in *Teague* analysis is to determine whether a new rule is being established. Although *Beck* came out in 1980, before the Nebraska Supreme Court decided Reeves' appeal in 1984,

"Under this [Court's] functional view of what constitutes a new rule, our task is to determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [the defendant] seeks was required by the Constitution." *Saffle v. Parks*, 494 U.S. 484, 488 (1990). Not only *Beck*, but also *Hopper v. Evans* was decided before the Nebraska Supreme Court concluded its review of Reeves' direct appeal, *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). As discussed earlier, *Beck* called the situation it was addressing "unique in American criminal law," and dealt with a situation where the jury was involved in sentencing, so that its consideration of guilt was subject to being influenced by concerns about what sentence it could impose, a situation wholly different from the circumstances of Reeves' case, where the jury had no connection whatever to the sentencing determination, and thus could not be distracted from its sole task of accurately assessing guilt. *Hopper* emphasized that *Beck* had no application to the situation where (as under the Nebraska view of felony murder) no lesser-included offenses existed upon which an instruction could

legitimately be given. Thus, any reasonable court considering Reeves' appeal, far from feeling compelled to conclude that what eventually became the Eighth Circuit's expansive construction of *Beck* was required by the Constitution, likely would have concluded just the opposite. That a result is not so obvious that a court must feel compelled to reach it can be demonstrated by just the sort of split between jurisdictions which has occurred between the Eighth and Ninth Circuits over this issue. *Butler v. McKellar*, 494 U.S. 407, 415 (1990). Hence, it is plain that, despite its reliance on *Beck*, what the Eighth Circuit has done in this case is indeed to create and apply a "new rule," which goes far beyond anything mandated by *Beck*. *See Lambrix v. Singletary*, No. 96-5658, 1997 WL 235069 (U.S. Jan. 15, 1997) (*Teague* inquiry is whether a jurist considering all the relevant material could reasonably have reached a conclusion contrary to the holding sought to be applied on habeas review).

C. NEITHER OF THE TWO *TEAGUE* EXCEPTIONS APPLY.

Teague allowed for two exceptional situations in which creation of a retroactive new rule would be permitted in a habeas proceeding:

> Under the first exception, "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'." This exception is clearly inapplicable. The proscribed conduct in the instant case is capital murder, the prosecution of which is, to put it mildly, not prohibited by the rule in [*Reeves*]. Nor did [*Reeves*] address any "categorical guarantees accorded by the Constitution" such as a prohibition on the imposition of a particular punishment on a certain class of offenders.

Butler v. McKellar, 494 U.S. at 415 (discussing retroactivity of new rule of *Arizona v. Roberson*, 486 U.S. 675 (1988) (citations omitted). As demonstrated by the insertion of *Reeves* into this quotation discussing another case, the first *Teague* exception obviously does not apply here, because the proscription of murder is not altered.

"The second *Teague* exception applies to new 'watershed rules of criminal procedure' that are necessary to the fundamental fairness of the criminal proceeding." *Sawyer v. Smith*, 497 U.S. 227, 241–42 (1990). Although *Beck* sought to enhance the reliability of capital proceedings, and that presumably is also the intention of the Eighth Circuit's extension of *Beck* in this case, this Court pointed out in *Sawyer* that, "A rule that qualifies under this exception must

not only improve accuracy, but also 'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding." *Id.* at 242 (emphasis in original). That the new rule promulgated by the Eighth Circuit in *Reeves* (that lesser offense instructions must always be given in a capital case, even if not provided for by state law and even if the sentencing is not done by the jury) does not qualify is shown by several facts: that this Court has never held lesser-included offense instructions to be constitutionally required in non-capital cases, *Beck*, 447 U.S. at 638 n.14; that the giving of lesser-included offense instructions arose as an aid to, and often is considered more beneficial to, the prosecution, *id.* at 633; *Spaziano*, 468 U.S. at 456; and that this Court found no contradiction of the "general premise that a criminal defendant may not be required to waive a substantive right as a condition for receiving an otherwise constitutionally fair trial" in holding that Spaziano was properly required to elect between waiving his statute of limitations defense and receiving lesser-included offense instructions in his capital case. 468 U.S. at 455–57. Obviously, no "bedrock procedural element essential to the

fairness of a proceeding" is this newly-minted rule of the Eighth Circuit's. Hence, it does not fall within either of the two *Teague* exceptions, and there is no persuasive reason why *Teague* should not be applied to this case.

CONCLUSION

Based on the foregoing authorities and arguments, Amicus Curiae respectfully requests this Court to grant Nebraska's petition for writ of certiorari and reverse the judgement of the Eighth Circuit in this case. That court's decision is fundamentally flawed, not only in its misreading of *Beck*, but in creating a new rule and applying it retroactively to Reeves in clear contravention of the rule of *Teague*. Thus, no matter how the case is analyzed, it cries out for the corrective action which is available only through this Court's exercise of certiorari.

Respectfully submitted,

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